IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

35 BAR AND GRILLE, LLC, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
V.	)	**CIVIL ACTION NO. SA-13-CA-34-FB**
	)	
THE CITY OF SAN ANTONIO,	)	
	)	
Defendant.	)	

THE CASE OF THE ITSY BITSY TEENY WEENY BIKINI TOP V. THE (MORE) ITSY BITSY TEENY WEENY PASTIE[1]

ORDER CONCERNING PRELIMINARY INJUNCTION

An ordinance dealing with semi-nude dancers has once again fallen on the Court's lap. The City of San Antonio ("City") wants exotic dancers employed by Plaintiffs to wear larger pieces of fabric to cover more of the female breast. Thus, the age old question before the Court, now with constitutional implications, is: Does size matter?

The genesis of this gentlemen's clubs case can be found at 2003 WL 21204471, known by some as "The Salomé Order."[2]

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[1] Itsy Bitsy Teeny Weeny Yellow Polka Dot Bikini (Knapp Records 1960).

[2]
> And Salomé, dressed only in seven thin veils,
> danced lasciviously at a men's club called
> the Palace . . . of King Herod, that is.
>
> The result was a fatal secondary effect
> for John the Baptist.

Adapted and paraphrased by the Court from the Bible, Mark 6:16-28, and the play Salomé written by Oscar Wilde starring Sarah Bernhardt as Salomé and produced in Paris in 1894. *Allstars v. City of San Antonio*, No. Civ. A. SA-03-CA-356-FB, 2003 WL 21204471, at *1 (W.D. Tex. May 19, 2003) (Biery, J.).

The City has amended Ordinance 97497 such that Plaintiffs and their employees would be more strictly regulated by a licensing process which includes:

* background checks;

* criminal records preventing them from working or continuing to work in clubs;

* wearing identification wristlets.

Plaintiffs clothe themselves in the First Amendment seeking to provide cover against another alleged naked grab of unconstitutional power.

The Court infers Plaintiffs fear enforcement of the ordinance would strip them of their profits, adversely impacting their bottom line. Conversely, the City asserts these businesses contribute to reduced property values, violent crime, increased drug sales, prostitution and other sex crimes, and therefore need to be girdled more tightly.[3] Plaintiffs, and by extension their customers, seek an erection of a constitutional wall separating themselves from the regulatory power of City government.

While the Court has not received *amicus curiae* briefs, the Court has been blessed with volunteers known in South Texas as "curious amigos" to be inspectors general to perform on sight visits at the locations in question.

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[3]The City examined thousands of pages of reports, studies and related court opinions regarding various aspects of SOB regulation. The legislative record is 3,223 pages long and includes ninety-three studies. See e.g., "Texas City Attorneys Association Crime and Value Related Effects of Sexually Oriented Businesses" (concluding that sexually oriented businesses decrease property values); "Adult Business Study" (Town of Ellicottville, N.Y.) (concluding SOB regulation necessary because of negative economic impact and increase in crime associated with such venues); "The Freedom and Justice Center: Strip Club Testimony" (concluding that "degree of sexual violence perpetrated against strippers explodes the myths about stripping as harmless entertainment"); "Why and How Our City Organized a Joint County-Wide Sexually Oriented Business Task Force" (City of Cleburne, TX) (documenting negative effect of SOBS on "moral core, general health and local property values"); "An Analysis of The Effects of SOBs on the Surrounding Neighborhoods in Dallas, Texas" (1997) (finding that venues featuring live nude and semi-nude dancing lead to higher crime in surrounding neighborhoods); "Crime Impact Studies by Municipal and State Governments on Harmful Secondary Effects of Sexually Oriented Businesses" (National Law Center) (summarizing studies conducted in thirty-five metropolitan areas, including cities in Texas); "Adult Entertainment Study" (City of New York) (discussing impacts and trends surrounding location of SOBs); "Director's Report: Proposed Land Use Code Texas Amendment, Adult Cabaret's" ("In the law and planning literature on adult entertainment uses, public safety hazards are the most often cited adverse impact on surrounding communities.").

However, they would have enjoyed far more the sight of Miss Wiggles, truly an exotic artist of physical self expression even into her eighties, when she performed fully clothed in the 1960s at San Antonio's Eastwood Country Club. Miss Wiggles passed October 14, 2012 at the age of ninety.[4]

[4]OUR TEXAS MAGAZINE, Winter 1995, at 9 (photograph); Mike Dunham, Mourners Recall the Humanitarian Side of Miss Wiggles, ANCHORAGE DAILY NEWS, Oct. 22, 2012; Paula Allen, "Utopia, Baby,", SAN ANTONIO EXPRESS NEWS, Feb. 26, 2006.

BACKGROUND

Following settlement of litigation arising out of the previous 2003 ordinance regulating gentlemen's[5] clubs, the City adopted an ordinance in 2005 which prohibited nude and topless dancing in public places and required permits for "human display establishments." The ordinance also subjected human display establishments to certain lighting, open-view building configurations and zoning restrictions.

In 2009, operators of certain adult entertainment clubs sued in state court challenging the ban on nude dancing as a violation of the entertainer's right to free speech. The state trial court ruled in favor of the City and the operators appealed. In a well reasoned and well written opinion, the Fourth Court of Appeals, Justice Sandee Bryan Marion writing for the panel, found the City ordinance prohibiting nudity and semi-nudity in public places and requiring permits for human display establishments imposed no greater incidental restriction on protected speech than was essential to the furtherance of the governmental interest in public places. RCI Entm't, Inc. v. City of San Antonio, 373 S.W.3d 589, 598-602 (Tex. App.–San Antonio 2012, no pet.). Further, the state appellate court found that requiring permits for human display establishments imposed no greater incidental restriction on protected speech than was essential to the furtherance of the governmental interest in combating secondary effects associated with sexually oriented businesses ("SOBs"). Id. Therefore, the ordinance withstood intermediate scrutiny and did not violate the free speech rights of erotic dancers. Id. In reaching this conclusion, the Fourth Court pointed out that being in a state of nudity is not an inherently expressive condition and being required by the ordinance to go from complete nudity to partly clothed

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[5]"gen•tle•man. . . . n. . . . 2. A polite, gracious or considerate man having high standards of propriety or correct behavior." WEBSTER'S II DICTIONARY 526 (New Riverside Univ. ed. 1984). The term is loosely used in this context.

involved a de minimis impact on the ability of the dancers to express eroticism. Id. at 601 (citations omitted).

In order to avoid being classified as human display establishments, Plaintiffs changed their dancers' attire to g-strings and pasties over the areolae of the female breast. Doing so enabled them to operate under dance hall licenses instead of having SOB status and having to obtain permits, reconfigure buildings and possibly relocate.

As a result, not a single human display establishment permit request was made and no such permits issued. In 2012, the City enacted Ordinance 2012-12-06-0934, amending Chapter 21, "because certain businesses featuring adult dance entertainment had found a way to circumvent the restrictions set forth in the 2005 ordinance." The new ordinance eliminates human display establishment status and includes the following definition:

> SEMI-NUDITY means a state of dress that fails to completely and opaquely cover (a) human genitals, pubic region, pubic hair or (b) crevice of buttocks or anus, or (c) *any portion of the female breast that is situated below a point immediately above the top of the areola,* or (d) any combination of (a), (b) or (c).

The effect of the ordinance is to require dancers at Plaintiffs' businesses to wear bikini tops in order for the businesses to avoid SOB classification and the concomitant licensing, building and location requirements. Plaintiffs argue the ordinance is a constitutionally impermissible restriction on the dancers' protected expression and unconstitutional because there is no evidence that the contested change in dancer attire (from pasties to bikini tops) would impact negative secondary effects. The City contends it is not a violation of the First Amendment to require Plaintiffs to choose whether they want to be licensed and offer topless dancing or be free of licensing requirements and the other regulations in the ordinance by offering dancers wearing bikini tops.

DISCUSSION

Plaintiffs must carry their burden of proof for the four requirements for a preliminary injunction: "substantial likelihood of success on the merits, substantial threat of irreparable harm absent an injunction, a balance of hardships in Plaintiffs' favor, and no disservice to the public interest." Daniels Health Scis., L.L.C. v. Vascular Health Servs., L.L.C., 710 F.3d 579, 582 (5th Cir. 2013). In order to prevail, Plaintiffs must carry the burden on all four elements. Canal Auth. v. Calloway, 489 F.2d 567, 569 (5th Cir. 1974). As summarized below, Plaintiffs have not met the prerequisites for obtaining preliminary injunctive relief. An Appendix is attached for those interested in a lengthy exposition, those who wish to appeal and those who suffer from insomnia.

Plaintiffs have not shown they are likely to prevail on the merits of their claims. The Fifth Circuit Court of Appeals has determined it is not a First Amendment violation to require gentlemen's clubs to decide whether they want to be licensed and offer dancers wearing pasties or performing topless or, alternatively, to be free of licensing requirements, building and zoning regulations in the ordinance by offering dancers who wear slightly more fabric, *i.e.*, a bikini top. Baby Dolls Topless Saloons, Inc. v. City of Dallas, 295 F.3d 471, 479-82 (5th Cir. 2002). This Court must follow Fifth Circuit precedent. Importantly, the RCI state appellate court made a finding that the ordinance governing nudity and semi-nudity is designed to regulate only secondary effects. 373 S.W.3d at 598-602. Additionally, the City does not have to show a correlation between the bikini top requirement and the amelioration of deleterious secondary effects. Baby Dolls Topless Saloons, Inc., 295 F.3d at 479-82.

Although Plaintiffs have shown they will suffer irreparable harm because they are alleging a First Amendment violation which cannot be remedied by an award of economic damages, Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328, 338 (5th Cir. 1981), Plaintiffs have not shown their

potential injury outweighs the threatened injury to the City because the City has offered credible evidence to support its position that Plaintiffs' businesses adversely affect the community. Erotique Shop, Inc. v. City of Grand Prairie, Civil Action No. 3:06-CV-20660G, 2006 WL 3422231, at *5 (N.D. Tex. Nov. 28, 2006). Finally, Plaintiffs have failed to show that semi-nude erotic dancing does not have adverse secondary effects. Therefore Plaintiffs have failed to show that granting the injunction will not adversely affect the public interest. Id. at *5-*6.

To bare, or not to bare, that is the question.[6] While the Court finds these businesses to be nefarious magnets of mischief,[7] the Court doubts several square inches of fabric will stanch the flow of violence and other secondary effects emanating from these businesses. Indeed, this case exposes the underbelly of America's Romanesque passion for entertainment, sex and money, sought to be covered with constitutional prophylaxis. Alcohol, drugs, testosterone, guns and knives are more likely the causative agents than the female breast, proving once again that humans are a peculiar lot.[8] But case law does not require causation between nudity and naughtiness. Baby Dolls Topless Saloons, Inc., 295 F.3d at 479-82.

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[6]WILLIAM SHAKESPEARE, THE FIRST FOLIO OF HAMLET, PRINCE OF DENMARK act 1, sc. 1 ("To be, or not to be, that is the question: . . . .")

[7]United States v. Guevara, SA-10-CR-870-FB, a case on this Court's docket involving two men who began a twenty-four hour car-jacking crime spree in 2010 after exiting XTC, a gentlemen's club, which only ended because they were caught. Each pleaded guilty and was sentenced to twenty years in prison. See also Katrina Webber, Man Shot During Robbery at South San Antonio Strip Club, April 3, 2013; Ana Ley, Two Patrons and Dancer Shot During Strip Club Brawl, SAN ANTONIO EXPRESS NEWS, January 31, 2013.

[8]As observed by young Scout in To Kill a Mockingbird, "I came to the conclusion that people were just peculiar." HARPER LEE, TO KILL A MOCKINGBIRD 280 (Harper Collins, ed., 1960).

Accordingly, the request for preliminary injunction is DENIED.

Should the parties choose to string this case out to trial on the merits, the Court encourages reasonable discovery intercourse as they navigate the peaks and valleys of litigation, perhaps to reach a happy ending.

It is so ORDERED.

SIGNED this 29th day of April, 2013.

FRED BIERY
CHIEF UNITED STATES DISTRICT JUDGE